

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 4, 2007 Session

RITA D. ROGERS v. JEFFREY T. ROGERS

**Appeal from the Chancery Court for Williamson County
No. 31246 Russ Heldman, Chancellor**

No. M2006-02399-COA-R3-CV - Filed September 28, 2007

Husband appeals final decree of divorce on the basis of improper venue arguing that Wife's subjective belief that the marriage had ended does not satisfy the "separation" requirement in the venue statute, Tenn. Code Ann. § 36-4-105. Finding that "separation" requires an objective manifestation of separation, we conclude that the trial court erred in its venue ruling. The case is consequently remanded for transfer under Tenn. Code Ann. § 16-1-116.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court
Reversed and Remanded**

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER, J., and ROBERT HOLLOWAY, SP. J. joined.

Andrew M. Cate, Nashville, Tennessee, for the appellant, Jeffrey T. Rogers.

James V. Mondelli, Brentwood, Tennessee, for the appellee, Rita D. Rogers.

OPINION

Jeffrey T. Rogers ("Husband") appeals several aspects of the trial court's order granting Rita Rogers ("Wife") a divorce, including alimony, division of property, and visitation with the couples' six minor children. Since we find Husband's objection to venue to be dispositive, we need address only that ground.

I. BACKGROUND

On January 25, 2005, Wife filed for divorce in Williamson County specifying that the parties lived at the "marital residence" in Brentwood, Tennessee. It is uncontroverted that the marital residence where the parties lived at the time Wife filed for divorce was in Davidson County. The divorce complaint, however, stated that the parties resided in Williamson County when they separated almost three (3) years earlier in April of 2002.

The parties agree that they lived together with their children in Williamson County until September of 2003, in Cheatham County from September 2003 until 2004, and in Davidson County beginning September or October of 2004. It is uncontradicted that the parties purchased the marital residence in Davidson County in the fall of 2004 and lived together in their Davidson County home. They also took several vacations together during the three years before the complaint was filed.

Husband immediately filed a motion to transfer asking that the case be dismissed or moved from Williamson to Davidson County explaining that the parties had lived in Davidson County since September 2004. The motion was heard on March 1, 2005, and both parties testified. It appears no transcript was made of that hearing. The trial court denied the motion with the following finding:

The Court has determined that Husband lacked credibility as a witness and that Wife was highly credible. Accordingly, the county in which the parties resided at the time of their "separation" was Williamson County.

On March 18, 2005, Husband filed a Motion for Interlocutory Appeal of the court's venue order. The transcript from the hearing on that motion is part of the record in this case. From that transcript it is clear that the trial court decided that the parties separated in April of 2002 when the parties last had sexual relations which Wife maintains were not consensual. According to the trial court's comments at that hearing, "her testimony was, as a result of that, emotionally she was divorced. She was totally separated from him. That was it. It was over. Kaput. No marriage from that point forward." On April 12, 2005, the trial court denied Husband's request for an interlocutory appeal.

On September 27, 2005, Husband filed a Motion to Reconsider the trial court's motion to transfer based upon improper venue. On November 22, 2005 the court denied the motion to reconsider.

After a hearing in August of 2006, in its Final Decree, the trial court granted Wife a divorce, named her the primary residential parent, allocated the marital assets and debts, granted Wife alimony and set Husband's child support. In the Final Decree, the trial court reaffirmed its holding that venue lay in Williamson County.

Husband then filed a Motion to Alter or Amend or For a New Trial, yet again raising the improper venue defense, and the trial court denied that motion. Husband filed his Notice of Appeal from the trial court's Final Decree and the trial court's denial of his motion to alter or amend.

On January 5, 2007, the trial court granted Husband's Motion to Stay Imposition of Final Decree. The stay order specified that the couple remained married and that spousal and child support during the appeal were to be governed by the Agreed Order in effect during the pendency of the divorce proceedings. Visitation, as described in the Final Decree, was not stayed.

II. ANALYSIS

Venue in a divorce action is governed by Tenn. Code Ann. § 36-4-105(A), which provides as follows:

The bill or petition may be filed in the proper name of the complainant, in the chancery or circuit court or other court having divorce jurisdiction, in the county where the parties reside at the time of their separation, or in which the defendant resides, if a resident of the state; but if the defendant is a nonresident of the state or a convict, then in the county where the applicant resides.

As this court stated in *Hawkins v. Tennessee Department of Correction*, 127 S.W.3d 749, 753 (Tenn. Ct. App. 2002):

Venue refers to locality, and in the legal sense it signifies the proper locality in which a court of competent jurisdiction may adjudicate an action. It is within the power of the legislature to fix the venue of actions according to its judgment. Tennessee's venue rules are largely statutory and are intended to provide the criteria for determining where a lawsuit may or should be filed. *Metropolitan Dev. & Hous. Agency v. Brown Stove Works, Inc.*, 637 S.W.2d 876, 880 (Tenn. Ct. App. 1982).

The issue on appeal is the trial court's determination that Wife's decision in April of 2002, that she was emotionally divorced is the "time of their separation" for purposes of the venue statute.

The parties have not cited any case that construes the language "at the time of their separation," and we have not located a case in Tennessee that addresses this particular point. Whatever the precise definition may be, however, we do not believe that the legislature intended "separation" to be a purely emotional, unilateral and subjective state of mind of one of the spouses. Instead, in order to qualify as "separation" under Tenn. Code Ann. § 36-4-105, we conclude that there must be some objective manifestation of separation. Such objective manifestations include filing for divorce or legal separation, establishing separate households, or taking other actions that evidence that the parties have separated.

The evidence before the trial court to establish venue in Williamson County does not meet these criteria. The Wife apparently testified to the trial court's satisfaction that in her mind the marriage was over in April of 2002 when the parties lived in Williamson County. The trial court believed Wife's testimony, and we have no indication that she is not credible. Her credibility as to when she subjectively decided her marriage was over, however, is not the point. After April of 2002, the parties continued to live together. While there is some hint in the record that Husband and Wife may have lived apart at some points in the interim, there is no question that they purchased the home in Davidson County together in October of 2004 and lived there together. Wife's intent to separate from Husband was objectively manifested when she filed for divorce while living in Davidson

County. Consequently, the parties resided in Davidson County at the time of the separation, and the proper venue was in Davidson County.

Tennessee Code Annotated § 36-4-105 “merely deals with venue of divorce actions,” and venue is waivable by the defendant. *Kane v. Kane*, 547 S.W.2d 559, 560 (Tenn. 1977); *Ferguson v. Ferguson*, M2001-01836-COA-R3-CV, 2002 WL 31443205, at *3 (Tenn. Ct. App. Nov. 1, 2002) (no Tenn. R. App. P. 11 application filed).

In this case, however, there was no waiver. Husband took great pains to raise the defense of improper venue early and often. The first pleading filed by Husband was a Motion to Transfer, wherein he asked that the case be dismissed or transferred to Davidson County. When that motion was denied, he requested an interlocutory appeal, which was likewise denied. Venue was raised as an affirmative defense in his answer and counter-claim. Husband then filed a Motion to Reconsider Venue, which was denied. Apparently, Husband raised the issue again at the hearing on the merits since the trial court refused to a change of venue in the Final Decree. Finally, Husband raised the issue in his Motion to Alter or Amend. On appeal, Husband characterizes venue as the predominant issue. Husband cannot be charged with failing to appropriately raise the question of venue.

Having determined that the correct venue for this action was Davidson County and not Williamson County, the remaining issue is the proper relief, *i.e.* whether the case can be transferred or whether it must be dismissed. Husband’s pleadings below requested a transfer of venue or a dismissal. In 2000, the legislature enacted a broad transfer statute that provides as follows:

Notwithstanding any other provision of law or rule of court to the contrary, when an original civil action, an appeal from the judgment of a court of general sessions, or a petition for review of a final decision in a contested case under the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, is filed in a state or county court of record or a general sessions court and such court determines that it lacks jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was originally filed. Upon such a transfer, the action or appeal shall proceed as if it had been originally filed in the court to which it is transferred on the date upon which it was actually filed in the court from which it was transferred.

Tenn. Code Ann. § 16-1-116.

Where venue is localized by statute and therefore jurisdictional, Tenn. Code Ann. § 16-1-116 allows transfer. *Hawkins*, 127 S.W.3d at 766. Tenn. Code Ann. § 16-1-116 has also been interpreted to allow transfer of actions where venue was improper but not jurisdictional. *See Humphreys v. Selvey*, 154 S.W.3d 544, 556 (Tenn. Ct. App. 2004). For a thoughtful discussion of Tenn. Code Ann. § 16-1-116 and its use of the term “jurisdiction,” *see Thomas v. Mayfield*, M2000-

02533-COA-R3-CV, 2004 WL 904080 (Tenn. Ct. App. April 27, 2004) (perm. app. denied Nov. 15, 2004).

We conclude that the transfer statute may be applied in this case and, under that statute, find that it is in the interest of justice that this action be transferred to the appropriate trial court rather than dismissed. Requiring dismissal would necessitate the parties beginning again, thus incurring more expense and time. Accordingly, we remand this matter to the trial court for entry of an order transferring this action to Davidson County. It is ordered that all of the terms of the stay order remain in effect until the Davidson County court orders otherwise after an opportunity to consider the issues involved.

Costs of this appeal are assessed against the appellee, Rita D. Rogers.

PATRICIA J. COTTRELL, JUDGE